

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Date: July 15, 2008
Time: 10:00 A.M. – 4:00 P.M.
Location: IDEM's Shadeland Avenue Offices, Conference Room C

Present at the meeting:

Brett Barber (Greeley & Hansen), Douglas Bley (Arcelor Mittal), Albert Ettinger (ELPC), Lori Gates (Christopher Burke Engineering), Jeff Hyman (Conservation Law Center, Alliance for the Great Lakes), Barton Jones (Strand Associates, Inc.), Kay Nelson (Northwest Indiana Forum), Dan Olson (City of Michigan City), Bowden Quinn (Sierra Club Hoosier Chapter), Rae Schnapp (Hoosier Environmental Council and Wabash Riverkeepers), Dave Wagner (WPCB), Lyman Welch (Alliance for the Great Lakes), Denny Wene (Alcoa).

Representing IDEM: Tom Easterly, Bruno Pigott, Martha Clark Mettler, Steve Roush, Dennis Clark, Shivi Selvaratnam, John Nixon, and MaryAnn Stevens.

OPENING REMARKS

Tom Easterly, IDEM Commissioner, stated the goal of the small workgroup sessions is to consider recommendations on each topic of consideration. He said the rulemaking will move forward in the absence of agreement, but it would be preferable to reach agreement among the stakeholders.

Martha Clark Mettler, IDEM, Office of Water Quality, Deputy Assistant Commissioner, asked that, in the interest of keeping the meeting on track, observers should observe and participants should be mindful and considerate of the opinions and opportunities of others to speak. She said IDEM would encourage some discussion, but protracted debate would not be helpful. Martha asked if the subgroup members wanted to set meeting ground rules (such as be polite, listen, and limit speech making), but the meeting members thought that to be an unnecessary exercise as all agreed to be respectful.

DISCUSSION TOPIC #1:

Section 1, Applicability

No one had a problem with section 1(a). Subsection (b) of the applicability section is where there is disagreement.

Going into the subgroup meeting, the draft rule language at 327 IAC 2-1.3-1(b) read as follows: "The antidegradation implementation procedures established by this rule apply to a nonexempt proposed new or increased discharge will result in a new or increased permit limitation that exceeds the de minimis lowering or water quality. For establishing a water quality based effluent limit (WQBEL), the reasonable potential to exceed (RPE) will be determined by applying the procedures outlined in 327 IAC 5-2-11.1(h) for non-Great Lakes system dischargers and 327 IAC 5-2-11.5 for Great Lakes system dischargers."

Doug Bley asked how the applicability related to industrial permits that have limits based on effluent limitation guidelines (ELGs) rather than WQBELs. Doug and Denny Wene explained that industrial permit limits from ELGs are influenced by the previous five years of production. A period of low production followed by an increase of production could trigger the requirement

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for an antidegradation demonstration. The industry representatives think production variability should not be subject to antidegradation review.

Albert Ettinger disagreed by saying that changes due to production variability are subject to antidegradation review. He stated he is sure that EPA will not approve a rule that allows more than a de minimis increase of a pollutant discharge. In response to the issue of old, possibly outdated ELGs, Albert said that, even if the ELG used to establish a pollutant limit is brand new, an antidegradation demonstration still must be done in the case of a new or increased pollutant discharge. He said, in the case of new ELGs, the discharge is likely to pass the antideg review but is not exempted from the review; and even with best technology, the discharger still must consider alternatives to creating an increased loading.

Steve Roush explained that there is a difference in the manner of setting permit limits for industrial vs. municipal plants. Municipal permits are based on the design flow whether or not the plant discharges at design. Industrial permits are based on production, which Steve agreed creates problems for the discharger because of the ups and downs of the economy.

Jeff Hyman stated production variability should be covered in the rule's exemption section. He believes the draft rule at 327 IAC 2-1.3-4(b)(1) allows an exemption as Doug and Denny want to cover production variability.

Albert suggested a compromise such as an expedited antideg review should be possible for the situation where a facility is not changing yet there are changes in production. He said this wouldn't be like the BP type of facility change that results in a modified permit but for the situation where loading isn't increased.

Denny Wene shared an example from Kentucky where the state rule includes a 20% across the board expansion exemption, but Region 4 wouldn't approve Kentucky's antideg rule unless de minimis was no more than 10%.

Commissioner Easterly reminded the subgroup members of the example of LTV Steel that is currently out of operation and asked, if it were purchased, would an antideg demonstration be required to get the facility back to its previous operational level.

Jeff again referred to exemption 4(b)(1) that covers the situations demonstrated by the examples mentioned.

Doug agreed the draft rule exemption could cover his production variability concerns but conditioned his agreement on the rule language.

The discussion spanned into BCCs. Albert agrees the 4(b)(1) exemption applies to a situation where a plant is not being changed and antideg review is not required due to an increase in production, but he doesn't agree this is applicable in the case of BCCs. Doug reminded Albert there are not ELGs for BCCs.

Albert stated that water conservation should be encouraged so he would rather have the antideg review requirement based on an increase in loading as opposed to an increase in concentration of

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a pollutant. He referred to Kentucky as a “confused state” having only concentration limits, which he thinks is illegal.

Dan Olson agrees with the 4(b)(1) exemption as long as it is clear that it covers new permit limits.

Jeff Hyman questioned the discussion leading to exempting a discharge from antideg review when it is cutting into water quality. He said the goal isn't water quality sufficient just to allow fish to live but to preserve good water quality. The consideration of antideg review shouldn't be based just on WQBELs. Jeff thought the applicability section as worded in the January 2008 draft was closer to what the rule's applicability should be.

Steve added that Indiana permits for Great Lakes Basin dischargers all have mass and concentration limits, but the draft rule expands antideg implementation to the rest of the state. Currently, permits for facilities outside of the Great Lakes Basin are not required to have mass limits.

Albert and Jeff stated any increase loading of a pollutant of concern (POC) should be subject to antideg review while Doug and Denny argued that the antideg review should be limited to BCCs because POCs include some 160 possible pollutants.

Jeff referred to 327 IAC 5-2-11.5(f) as evidence that a limit is broader than WQBELs and includes antideg.

Albert provided the following Iowa definition of POC: A constituent that is reasonably expected to be in a discharge and may affect beneficial uses of the receiving water.

Albert expressed concern about a permit issued to a modified facility not considering pollutants other than those in the existing permit. He compared coal mines with small and variable flows against large waterbody dischargers such as Great Lake dischargers. He also described dischargers to the Mississippi River using diffusers and never having a reasonable potential to exceed even when quadrupling their discharge.

Martha stated Indiana currently does look at pollutants reasonably expected to be present in a discharge. She stated IDEM will work in the concept of loading to the applicability section though she thought it redundant to mention de minimis since it is a listed exemption in section 4 of the rule.

Lori Gates wants the applicability section to specify whether it includes individual permits, general permits, or both. Martha and Bruno asked to hold off on the general permit discussion, but, IDEM expects to scrutinize each general permit under the antidegradation rule once language is determined. In other words, it would be an activity for IDEM rather than the permit holders of general permits.

To come to a conclusion at the end of the discussion on the applicability section wording, the subgroup members participated in a group writing effort with Dave Wagner writing on the dry mark board at the front of the meeting room. The effort resulted in the following revised rule language at 327 IAC 2-1.3-1(b):

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“The antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a pollutant of concern to a surface water of the state that is not exempt under section 4 of this rule.”

The subgroup participants tentatively agreed to the new section 1(b) applicability statement with the understanding that the statement will be taken back to nonsubgroup members for discussion before final approval is given. Albert Ettinger reminded IDEM to make changes throughout the draft rule consistent with the modifications made to the section 1(b) applicability statement (use of “loading”).

DISCUSSION TOPIC #2:

Definition of “pollutant of concern”

Martha handed out copies of the current IDEM permit application form required for listing pollutants that are known or reasonably known to be present in the discharge. The form dates to 1990. It was noted that endocrine disruptors are not included in the list of pollutants of concern (POCs). Dan Olson said he cannot agree to the POCs on the handed out form because it lists fecal coliform rather than E. coli.

Doug Bley stated that he wants Tier II constituents excluded from the list of POCs. He asked whether an antidegradation demonstration would be triggered in the situation where a permit reissuance doesn't include a limit for a new constituent but identifies it as present in the discharge. Doug's specific concern is for a pollutant that he knows is in his plant's discharge, but it can't be detected through testing.

Albert Ettinger objected to Doug's suggestion to limit POCs to Tier I constituents.

Jeff Hyman thought Doug's situation would be covered by the draft rule exemption under section 4(b)(3).

Steve Roush explained that an antideg demonstration is not required for Doug's situation where the constituent is already in the effluent, though newly discovered through improved or new monitoring or testing, and the discharger hasn't taken deliberate action to increase its loading.

Denny Wene expanded on Doug's situation by asking what if the constituent is below the limit of quantification (LOQ). He explained the situation at his facility where processes haven't changed but new contaminants have been introduced from raw materials now brought in from China. Denny said the new contaminants will trigger RPE and, therefore, an antideg demonstration.

Commissioner Easterly asked what chemicals are there that cause harm below the LOQ. Steve's reply was PCBs and mercury (GLI rules were developed before mercury testing was available to the level it is today.)

Rae Schnapp asked IDEM to explain how the determination is made as to what constituents to test for in an effluent.

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Steve explained that whole effluent toxicity (WET) testing is conducted when there are a lot of water treatment additives. He also stated that RPE is figured only on those constituents expected to be in the discharge.

Shivi Selvaratnam, IDEM's water quality program coordinator and toxicology expert, added that IDEM has a reference source in Michigan's toxicology department.

Bruno Pigott stated that IDEM's permitting process does look beyond the POCs listed on the state form. Permit limits can also be based on the source or nature of the discharge and include narrative standards.

To come to a conclusion at the end of the discussion on the definition of "pollutant of concern", another group writing effort developed the following tentatively accepted definition:

““Pollutant of concern” means a constituent that is reasonably expected to be present based on the source and nature of the discharge.”

MaryAnn Stevens asked to insert “in the discharge” after “present”, but Albert objected based on the unresolved issue of 401 water quality certifications where there isn't a direct discharge. With the resolution of the 401 issue later in the subgroup meeting, Albert wasn't as opposed to the insertion of “in the discharge”.

DISCUSSION TOPIC #3:

General permits and 401 water quality certifications

In a short, generalized discussion about general permits and 401 water quality certifications, Commissioner Easterly said that EPA wants IDEM to define general permit process under antidegradation. He stated he believes that a 401 water quality certification including mitigation creates an environmental improvement not a degradation; therefore, a certification wouldn't be subject to an antideg demonstration.

Martha stated that, after the antidegradation rule is effective, IDEM will do an assessment of all existing general permits under the antideg rule.

Jeff asked if a 401 water quality certification is an exemption under the antideg rule. Rae and Albert stated 401 can't be exempt under the antideg rule while the 401 rule says mitigation is not exempt.

Doug Bley wanted it noted in the subgroup meeting summary that the subgroup reached consensus that a 401 water quality certification doesn't have to be reviewed for antidegradation under both the 401 rule and the antidegradation rule.

DISCUSSION TOPIC #4:

Exemptions, Draft rule section 4

Martha acknowledged that, though it isn't stated in section 4, the exemptions are meant to apply only to non-BCCs while also acknowledging that mercury and PCBs are somehow different.

Basic statements:

GLI doesn't allow increases of BCCs.

Rulemaking created a statewide mercury variance.

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No variance allowed for a new discharger.

Martha suggested starting the exemption discussion by categorizing the exemptions as to whether they increase loading or not. She said the current draft rule does not arrange the exemptions in any particular order.

Rae, Jeff, and Albert wanted confirmation that a discharger has to justify to IDEM on a permit renewal application that a situation of no increase of loading exists at the facility.

Exemptions under section 4(b):

- (1) "straight renewal" exemption with operational variability. Subgroup agreed it is no increase of loading. Dan Olson read existing rule language from 327 IAC 5-2-11.3(b)(1)(C)(i) that basically says the industrial permittee has to operate within existing permit limits unlike municipal permits that are based on total flow capacity. The subgroup thought it a good idea to include the GLI language into exemption 4(b)(1).
- (2) Bypass exemption. Subgroup agreed it is no increase of loading.
- (3) New limits for a POC for an existing permitted discharger. The environmental representatives do not agree that this is a no increase of loading situation. The subgroup did agree that a situation of improved analytical testing without a change in flow isn't a situation subject to antideg demonstration.
- (4) POC in intake water. Subgroup agreed it is no increase of loading.
- (5) Wet weather and CSO controls. Subgroup agreed it is no increase of loading but also agreed it would improve the antideg rule to have separate subdivisions for the municipal CSO and the industrial storm water control exemptions. The scope of discharge to the same watershed is not acceptable.
- (6) Short term, temporary lowering of water quality. Not a situation of no increase of loading.
- (7) CERCLA, RCRA, UST discharges. Not a situation of no increase of loading.
- (8) Increase of sewer area or connection of failing septic. Not a situation of no increase of loading. Rae thinks this exemption could be an increase of loading while Dan Olson said it isn't so long as the WWTP has the capacity to take the flow of the failing septic systems. Dan suggested changing "customer" to "user".
- (9) Trading of pollutants. To be debated by the subgroup as to whether it constitutes an increase of loading.
- (10) More pollutant trading. To be debated by the subgroup as to whether it constitutes an increase of loading.
- (11) Noncontact cooling water. Albert has a problem with this exemption being treated as no increase of loading especially with regard to disinfection and discharge of chlorine. He admitted to being unclear on Indiana's dechlorination requirements. Martha said IDEM will provide more information about IDEM's current permitting process in this regard.
- (12) Non-BCC used to treat nuisance species, such as zebra mussels, in intake water.
- (13) New or increased discharge of a POC that is a de minimis lowering of water quality.

Denny Wene listed the following as his interests for additional rule exemptions:

- 316(a) variances
- variances in general
- WWTP additives
- Something to incorporate the ELG concept

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Internal outfalls

The subgroup thought it might be possible to expand the section 4(b)(12) exemption to include wastewater treatment additives.

Kay Nelson reminded the group that the US Steel permit ran into trouble over an internal outfall and the public's difficulty in discerning that as different from an outfall to a receiving waterbody.

It was noted that the antideg demonstration requirement at 327 IAC 2-1.3-6(c) matches that which is exempted under section 4(b)(7). Martha referred to the air pollutants covered under 327 IAC 2-1.3-6(c)(4) as being lost in rule clean up. The industrial representatives want the air pollutants covered as exemptions.

DISCUSSION TOPIC #5:

Exemptions, Draft rule section 4(a) regarding ONRWs

The subgroup briefly discussed the wording of section 4(a) regarding allowance for new or increased discharges in ONRWs.

Jeff pointed out the inconsistency between section 4(a)(1) where the time limit is placed on the duration of the discharge and section 4(b)(6) where the time limit is placed on the duration of the lowering of water quality. As Jeff indicated, a discharge lasting 12 months could have an effect of lowering water quality much longer than 12 months. Jeff also challenged the use of "permanent" in section 4(a)(3) saying it is an ambiguous word.

The subgroup reached consensus that rule language indicating a time limit on new or increased discharges should include both the "less than 12 months or 365 days" limit on the discharge and the "not to exceed 12 months" limit on the lowering of water quality.

NEXT STEPS

The tentative agreement made at the June 25th stakeholder meeting was that the subgroup meetings would be planned in two week intervals though there was some comment that two weeks between meetings would not allow enough time for subgroup representatives to share the subgroup meeting outcome with their constituents. The same timing consideration was raised at the subgroup meeting and, as a result, the next subgroup meeting will be on Tuesday, August 12, 2008, from 10 am to 4 pm, at IDEM's Shadeland Avenue office, Conference Room C.

Summary of Subgroup Consensus from this Meeting

Revision to applicability language at 327 IAC 2-1.3-1(b) as follows:

"The antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a pollutant of concern to a surface water of the state that is not exempt under section 4 of this rule." (See page 4 of this summary.)

Note: following the subgroup meeting, Martha received an e-mail from Dave Pfeifer, EPA Region 5, saying "From the perspective of consistency with the Federal requirements (CWA, regs, and guidance), the revised language on applicability looks great."

Revision to the definition of "pollutant of concern" at 327 IAC 2-1.3-2(45) as follows:

"Pollutant of concern" means a constituent that is reasonably expected to be present based on the source and nature of the discharge." (See page 5 of this summary.)

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After the antidegradation rule is effective, IDEM will do an assessment of all existing general permits under the antideg rule. (See page 5 of this summary.)

A 401 water quality certification doesn't have to be reviewed for antidegradation under both the 401 rule and the antidegradation rule. (See page 6 of this summary.)

Exemptions under 327 IAC 2-1.3-4(b) that the subgroup agreed create no increased loading (See this summary starting on page 6 for exemption discussion):

- 327 IAC 2-1.3-4(b)(1), renewal
- 327 IAC 2-1.3-4(b)(2), bypass
- 327 IAC 2-1.3-4(b)(4), POC in intake water
- 327 IAC 2-1.3-4(b)(5), Wet weather and CSO controls

Exemptions under 327 IAC 2-1.3-4(b) that the subgroup agrees create an increased loading include:

- 327 IAC 2-1.3-4(b)(6), short term increase
- 327 IAC 2-1.3-4(b)(7), CERCLA, etc.
- 327 IAC 2-1.3-4(b)(9), pollutant trading
- 327 IAC 2-1.3-4(b)(10), pollutant trading
- 327 IAC 2-1.3-4(b)(13), de minimis

Of the exemptions under 327 IAC 2-1.3-4(b) that the subgroup discussed (through subdivision (8)), 327 IAC 2-1.3-4(b)(3) and 327 IAC 2-1.3-4(b)(8), resulted in disagreement among the subgroup members and will need further discussion.

The rule language at 327 IAC 2-1.3-4(a) indicating a time limit on new or increased discharges should include both the "less than 12 months or 365 days" limit on the discharge and the "not to exceed 12 months" limit on the lowering of water quality. (See page 7 of this summary.)

Existing GLI rule language from 327 IAC 5-2-11.3(b)(1)(C)(i) is to be included into the exemption under 327 IAC 2-1.3-4(b)(1). (See page 6 of this summary.)

Add an exemption for internal outfalls (not discharging to a receiving waterbody). (See page 7 of this summary.)

Must change "watershed" in 327 IAC 2-1.3-4(b)(5). (See page 6 of this summary.)

Provide separate exemption subdivisions for municipal CSO and industrial storm water control. (See page 6 of this summary.)